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Confronting Accessibility in Clinical Legal Education: Human Rights Law and the Accommodation of Law Students with Disabilities in External Placements

ROXANNE MYKITIUK & C TESS SHELTON*

Les étudiantes et étudiants canadiens vivant avec un handicap font face à des obstacles lorsqu'ils font une demande de stage clinique ou pendant leur stage. Cet article vise à répondre à des questions pratiques sur l'étendue de l'obligation d'accommoder ces étudiants et étudiantes lors des stages cliniques. Il offre une analyse juridique du cadre des droits de la personne sur l'accommodement relativement aux stages d'éducation juridique clinique. Il propose aussi des critères pour le développement d'une politique d'accessibilité des stages cliniques.

Canadian law students with disabilities confront barriers in applying to and working in clinical placements. The article is motivated by practical questions about the scope of the duty to accommodate law students with disabilities in clinical education placements. It offers a legal analysis of the human rights accommodation framework in relation to clinical legal education placements. It also proposes criteria for a policy governing the accessibility of clinical legal placements.

IN CANADIAN LAW SCHOOLS, CLINICAL LEGAL EDUCATION has become a popular and promoted pedagogy.¹ In the past ten years, the number and range of for-credit clinical opportunities for law students has expanded significantly with a substantial student uptake.² In addition to placements in community legal clinics with a poverty law or social justice focus, students now participate in clinical education programs specializing in environmental, corporate, Indigenous, international, disability, intellectual property, and domestic violence law, to name just a few.³ While some of these programs place students in legal clinics and law firm environments, in other programs, students may be working for a government department or agency, a non-governmental organization, or a Band Council, and sometimes in a rural or remote location. The rise in clinical opportunities may be a result of the promotion of experiential education in the university more generally, and as a way of providing law students an opportunity to apply their knowledge in

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¹ Throughout this article we use the terms “clinical programs” and “clinical placements” to include both those housed within law schools and with partners in the community. We understand these programs and placements as a subset of a larger range of experiential education opportunities available to students in Canadian law schools, including, for example, through simulations. Clinical programs are distinguished by the fact that students work with actual clients and/or on real legal issues in these placements. In the legal practice settings of these programs, students are most often part of a workplace in which they apply their theoretical knowledge, develop practical legal skills, build professional networks, and learn professional responsibilities, develop social skills, and often serve individual, community, institutional, or corporate clients.

² Lorne Sossin, “Experience the Future of Legal Education” (2014) 51:4 Alta L Rev 849.

³ Gemma Smyth, Samantha Hale & Neil Gold, “Clinical and Experiential Learning in Canadian Law Schools: Current Perspectives” (2018) 95:1 Can Bar Rev 151 at 160.

context and to gain hands-on “job-specific technical skills and the so-called soft skills,”⁴ while simultaneously coupling their experience with appropriate reflection in the classroom. Moreover, disparate community placements are offered as a way of exposing law students not only to the breadth of legal issues and skills involved in legal practice, but to the vast array of clients, communities, and interests that lawyers serve.

All students enrolled in legal education programs are entitled to meaningful access to the range of for-credit clinical and experiential offerings that have become such an integral part of the upper-year curriculum in Canadian law schools. This includes law students with disabilities. In the past twenty-five years the number of students with disabilities enrolled in Canadian universities has risen as a result of the increase in the number of students with learning disabilities, mental health conditions, chronic health conditions, or who are on the autism spectrum who are attending university.⁵ This growth in the number of undergraduate students with disabilities is mirrored in the rise of professional school applicants with disabilities. In the past twenty years, the number of students with disabilities attending Canadian law schools has begun to increase.⁶ However, the law school population becoming more diverse does not mean it is becoming more inclusive or more accessible.⁷ Empirical measures of diversity, such as raw counts of persons who self-identify as having a disability, do not measure how inclusive the program is for students with disabilities. While the increase in students with disabilities in law schools is encouraging, students with disabilities confront barriers to academic and social inclusion in law school on a regular basis: navigating inaccessible classrooms and corridors; contending with stigmatizing attitudes about extended time and test-taking; negotiating for accommodations; and waiting for materials in accessible formats long after they have been taken up in class. These are usual occurrences notwithstanding the existence of university academic accommodation policies and procedures and, in some provinces, provincial accessibility legislation.⁸ Full inclusion of students with disabilities requires the removal of environmental, structural, attitudinal, and social barriers for qualified students, and inclusion in all aspects of the academic and social activities of the law school.

This article focuses on the accessibility of the clinical programs that are offered for academic credit as part of the academic curriculum. During these placements, law students are included in the work and workplace of a public or private institution. Because this work is often performed outside the law school, the issues of accessibility and accommodation become more complex. What are the requirements of accessibility and accommodation in these contexts? Who is responsible for accommodation and accessibility in the clinical placement? Who is required to pay for accommodations? What are the essential requirements of the placement? To whom does a student appeal in the event that requested accommodation at the placement is denied? As Academic Directors of clinical education programs at our respective universities (and members of faculty

⁴ Sossin, *supra* note 2.

⁵ Jennifer M Stewart & Saul B Schwartz, “Equal Education, Unequal Jobs: College and University Students with Disabilities” (2018) 73:2 RI 369 at 369.

⁶ REACH Canada, *A Framework for Action, Law Schools, Education Equity and Students with Disabilities: Working Towards Equitable Access to Legal Education* (Ottawa: Reach Canada, 2001) at 21.

⁷ For a discussion of the appropriation of the concepts “diversity” and “inclusion” within neo-liberalism see David T Mitchell, “Disability, Diversity and Diversion: Normalization and Avoidance in Higher Education” in David Bolt & Claire Penketh, eds, *Disability, Avoidance and the Academy: Challenging Resistance* (London: Routledge, 2016) at 9-20.

⁸ Bill M-219, *British Columbia Accessibility Act*, 3rd Sess, 41st Parl, British Columbia, 2018.; Bill 26, *The Accessibility for Manitobans Act*, 2nd Sess, 40th Leg, Manitoba, 2013; *Accessibility for Ontarians with Disabilities Act*, RSO 2005, c 11; Bill 59, *An Act Respecting Accessibility in Nova Scotia*; 3rd Sess, 62nd Leg, Nova Scotia, 2017.

committees dedicated to clinical education) and as scholars who research in the area of disability law, these are some of the questions we have had to think about as students with disabilities seek access to, and participate in, clinical programs (both on- and off-campus). While most Canadian universities, and some law schools, have policies and procedures that address issues of accessibility and accommodation in the classroom, few have specific or robust policies regarding accessibility and accommodation in clinical placements.⁹ The aim of this article is to provide a resource for academic and non-academic clinic directors, clinical legal education directors, officers and administrators, law students, disability accommodation and accessibility officers, and all others who are responsible for ensuring the accessibility of clinical placements and the accommodation of students with disabilities in clinical programs.

The article begins by briefly situating access to clinical legal education for persons with disabilities within the context of clinical legal education today. Because disability is an animating concept of this article, we draw on the work of critical disability scholars to canvass understandings of this concept. We then introduce the benefits of ensuring access to clinical legal education for persons with disabilities, followed by a discussion of the possible barriers law students with disabilities encounter in clinical placements. Inspired by the Ontario Human Rights Commission's recent publication, *Policy on Accessible Education for Students with Disabilities*,¹⁰ Part II undertakes a legal analysis of the accommodation requirements for law students with disabilities in clinical placements. Drawing on these discussions, Part III sets out suggested requirements of a policy regarding accommodation for law school clinical programs. Finally, in Part IV we step back from a narrow legal analysis of the requirements of accommodating law students with disabilities in clinical placements and consider the broader systemic goals of accessibility and inclusion for students with disabilities.

I. CLARIFYING THE CONTEXT

A. CLINICAL LEGAL EDUCATION AND DISABILITY ACCOMMODATION

The expansion and promotion of experiential education as a pedagogy on university campuses, including at law schools, in the past decade can be viewed as a direct response to calls from the business and broader employment community to have students more “job ready” upon graduating from university. Mandating, or at least providing opportunities for, experiential education as part of the university curriculum introduces students not only to some of the employment specific technical skills used in the workplace but also to the social dynamics of a workplace culture. In the law school environment, the proliferation of clinical program offerings in some provinces has occurred against a backdrop of decline in available articling positions for law students, and

⁹ Osgoode Hall Law School has an *Accommodation Information Sheet* posted on their Clinical and Intensive Programs website, online: <osgoode.yorku.ca/wp-content/uploads/2018/12/Accommodation-Information-for-Students-2018-Final.pdf> [perma.cc/8X2K-EZPU]. Parkdale Community Legal Services has a *PCLS Student Accommodations & Accessibility Protocol* available at: <parkdalelegal.org/wp-content/uploads/2019/01/Accommodations20Protocol20FINAL.pdf> [perma.cc/48WA-QY75]. It is worth noting that at the time of writing, each of these documents is a PDF, making accessibility by screen readers and text-to-speech software difficult.

¹⁰ Ontario Human Rights Commission, “Policy on Accessible Education for Students with Disabilities” (2018), online: <<http://www.ohrc.on.ca/en/policy-accessible-education-students-disabilities>> [perma.cc/SD6T-TV3F] [“OHRC Education Policy”].

pressures by the provincial law societies to influence the content of legal education and to orient it towards skills readiness.¹¹ Read in this context, a rise in experiential education programs can certainly be viewed as an act of downloading responsibility for articling and its functions to the law school, and an opportunity to train law students in skills of the workplace as part of their legal education, without employers being required to pay them for their work.¹²

There are, however, important aspects of clinical legal education that position it outside of this market framing. Clinical legal education, as a pedagogy, originated in the United States in the late 1960s–70s as a distinct effort to address the lack of access to justice for people living in poverty with legal problems.¹³ In this sense, clinical legal education was a response to the rarefied legal education engendered by the Socratic and caselaw methods dominating legal education in Anglo-American universities that kept “students ... well insulated from the more miserable facts of the administration or maladministration of justice by being confined to the classroom and casebooks.”¹⁴ In Canada, a small number of law schools embraced community-based access to social justice programs as part of their curriculum, including an affiliation with neighbourhood based legal service clinics.¹⁵ A principle aim of clinical education was, and in many programs is, to situate law students in a context where they can learn first-hand about the injustices in society and how our system of justice responds, or fails to respond, to them. Through direct interaction with clients confronting legal problems, it was envisioned that law students would come to recognize the role of law in shaping and responding to these injustices and that this would inculcate in them a sense of responsibility to work for social change.

Clinical legal education programs continue to combine placements in the workplace directly with corresponding time in the seminar room, accompanied by theoretical readings, academic instruction, and time to reflect upon the broader meaning and significance of the practice experience in light of identified pedagogical themes, concepts, and objectives. Therefore, while the clinical placement does indeed provide students with an opportunity to acquire practice skills, learn professional responsibility, and become better acquainted with areas and styles of practice, all of this is situated, supervised, and evaluated in a broader academic framework in which the learning needs of the student are placed first. Through clinical education, law students have an opportunity to get into the real world of law and return to the classroom with a more robust appreciation of how legal doctrine and legal theory actually work or do not work.

¹¹ Heather Douglas, “Articling Crisis: Views from Across the Country” (2019) online: *Ontario Bar Association* <oba.org/Sections/Young-Lawyers-Division/Articles/Articles-2017/November-2017/Articling-Crisis-Views-from-across-the-country> [perma.cc/P3QM-YBX6].

¹² This may be especially so in Ontario where students who are unable to secure articles or, who for other reasons, register in the Law Practice Program (LPP). In the LPP, placement organizations are encouraged to compensate students for their work, but this is not a requirement of the program: Sara Mojtehdzadeh, “Ontario Law Practice Program leaves some students in financial limbo,” *The Toronto Star* (2 January 2015), online: <thestar.com/news/gta/2015/01/02/law_practice_program_leaves_some_students_in_financial_limbo.html> [perma.cc/MD5D-9HZK].

¹³ Margaret Martin Barry, Jon Dubin & Peter Joy, “Clinical Education for this Millennium: The Third Wave” (2000) 7:1 *Clinical L Rev* 1 at 18–21; Laura G Holland, “Invading the Ivory Tower: The History of Clinical Education at Yale Law School” (1999) 49:4 *J Leg Educ* 504 at 516–17; Frederick H. Zemans, “The Dream Is Still Alive: Twenty-Five Years of Parkdale Community Legal Services and the Osgoode Hall Law School Intensive Program in Poverty Law” (1997) 35:3/4 *Osgoode Hall L J* 499; Shelley Gavigan & Sean Rehaag, “Poverty Law, Access to Justice, and Ethical Lawyering: Celebrating 40 Years of Clinical Education at Osgoode Hall Law School” (2014) 23:1 *J L & Soc Pol’y* 1.

¹⁴ William Pincus, “Concepts of Justice and of Legal Education Today” in William Pincus, ed, *Clinical Education for Law Students: Essays* (New York: Council on Legal Education for Professional Responsibility, 1980) 125 at 131.

¹⁵ Gavigan & Rehaag, *supra* note 13.

For some law students with disabilities, participation in clinical legal education programs may provide additional benefits and constitute an integral component of their law school experience today. According to a recent National Educational Association of Disabled Students (NEADS) report, university graduates with disabilities have a higher rate of unemployment compared to those without disabilities, in part because professional skill-building opportunities during their post-secondary education are insufficiently accessible to them.¹⁶ Professional skills include the suite of knowledge, skills, and attributes generally accepted as necessary for entrance into and success in a given profession or vocation. The NEADS study identifies two “pressure points during their post-secondary education where students with disabilities face significant barriers to access and accommodation that will impact their transition to employment.”¹⁷ The first relates to student participation in practical and applied learning activities linked to the core curriculum of their educational program, including, for example, labs, equipment, field placements, or study abroad. The second concerns the extra-curricular experiences that have become increasingly expected of students including part-time employment and volunteering, as well as study- and work-abroad programs. Because students with disabilities are more likely than their non-disabled peers to encounter barriers that prevent them from participating in these activities, and employers often look for indicators of activities related to or correlated with workplace experience and skills development, clinical legal education placements can be especially valuable for students with disabilities whose resumes lack (or contain less of) the typical indicators of professional skill development. Moreover, because most clinical programs involve a direct supervisory relationship between the law student and a lawyer, students with disabilities are exposed to mentoring, networking experiences, and opportunities for employment-related references that may have been absent in the past. Clinical programs provide all law students an opportunity to experiment with an area of law in which they may wish to practise in the future, acquire practice-related skills, and begin to develop a professional demeanour. However, for many law students with disabilities, placements are the first time they will have had to identify the accommodations they may need in a practice setting and advocate for themselves in a workplace setting to get those accommodations.

B. UNDERSTANDING DISABILITY

Disability is a contested and historically contingent concept. At its root is the notion that people with divergent or anomalous bodies or minds are identified and singled out for specific treatment or regard. Disability, then, has something to do with identifying and living with embodied difference, and the corresponding way in which that difference is regarded and treated within a social context, and the concomitant effects on those identified as different. Beginning in the mid-19th century, disability also became associated with “abnormality.”¹⁸ With the advent of statistical thinking and the development of the bell curve, the paradigm of standardization or normal(cy)

¹⁶ National Educational Association of Disabled Students, “Landscape of Accessibility and Accommodation in Post-Secondary Education for Students with Disabilities” (2018) at 88, online:

<neads.ca/en/about/media/AccessibilityandAccommodation%202018-5landscapereport.pdf> [perma.cc/NQ7Y-BGQZ].

¹⁷ *Ibid* at 89.

¹⁸ Lennard J Davis, *Bending Over Backwards: Disability, Dismodernism & Other Difficult Positions* (New York: New York University Press, 2002) at 105.

came into existence.¹⁹ Applying this concept to people, those bodies and minds that did not conform to the norm were considered abnormal. This normal/abnormal dichotomy not only marks certain people descriptively as outside the normal range of being human, but that which is normal is also elevated to become the standard to which all people should aspire.²⁰ Concomitantly, social, economic, technological, and cultural worlds are organized and built to accommodate the qualities and characteristics of those who are “normal,” thereby excluding those at the margins of the bell curve.²¹ To fit within constructed social, economic, technological, and cultural structures, those who are “abnormal” or disabled are often required to re-fashion themselves through techniques of cure, rehabilitation, and prosthetics to conform with and function “normally.” Thus, rather than understanding that social, cultural, economic, and physical environments are designed for a particular kind of body and mind, disability has often been understood as something that resides in the individual. The individual must, in some way, alter himself to fit in or otherwise be excluded from mainstream society.

Some dominant conceptions of disability have perpetuated this idea. The medical model of disability, for example, locates disability in the body and minds of the individual person and identifies their structural pathology, functional limitations, activity restrictions, and/or psychological deficits.²² It is generally understood that disability is something to be diagnosed, prevented, cured, treated, or even eliminated, using the tools of medicine and rehabilitation. As Martha E Simmons and Marian MacGregor state, “[t]he lack of participation in society is a fault of the disabled person whose body is a sight [or site] of the failed normal.”²³ Accordingly, this conception distinguishes disability as an anomaly and a burden, and generally assigns responsibility for inclusion and its costs to the private realm. In addition, the emphasis on biological reductionism, characterized as individual lack or pathology, encourages the view that people with disabilities, in their difference, are inferior, setting up the conditions for stigmatization, discrimination, and oppression. While people with disabilities are excluded from participating in social, economic, and cultural life because material worlds are not shaped to include diverse bodies and minds, attitudinal biases are equally insidious. Beliefs about the inferior, inherently negative, and flawed status of persons with disabilities are based on their bodily difference and operate to justify oppressive treatment by others. Moreover, these attitudes and biases are so pervasive that they have become second nature and often remain unrecognized as oppressive.

In contrast to the medical model of disability, the social model distinguishes between impairment and disability. Impairment is defined as “the functional limitations within the individual caused by physical, mental or sensory impairment,” while disability is “the loss or limitation of opportunities to take part in the normal life of the community due to physical and social barriers.”²⁴ From this perspective, disability is not inherent in the individual but is the product of social arrangements, and can therefore be reduced or eliminated by changing environments, attitudes, policies, and practices rather than people. While not without its own flaws,

¹⁹ Lennard J Davis, *Enforcing Normalcy: Disability, Deafness, and the Body* (London: Verso, 1995).; Davis, *supra* note 18.

²⁰ Kerry Taylor & Roxanne Mykitiuk, “Genetics, Normalcy and Disability” (2001) 2:3 *Isuma: Can J of Pol’y Research* 65 at 67.

²¹ Davis, *supra* note 19.

²² Tom Shakespeare, *Disability Rights and Wrongs* (London: Routledge, 2006) at 10-19.

²³ Martha E Simmons & Marian MacGregor, “Clinical Legal Education and Disability: Accommodation, Implementation and Assessment in Service-Learning Programs” (2016) 23:4 *Intl J Clin Leg Educ* 1 at 20.

²⁴ Disabled People’s International, “Proceedings of the First World Congress,” (Singapore: DPI, 1982), cited in Shakespeare, *supra* note 22 at 14.

the social model of disability draws attention to the ways in which inclusion and accessibility for people with varied bodies and minds require systemic responses that alter the social contexts and practices ordering the way we all live. As acknowledged by the Supreme Court of Canada in *Granovsky v Canada*, “[e]xclusion and marginalization are generally not created by the individual with disabilities but are created by the economic and social environment and, unfortunately, by the state itself.”²⁵

Critiques of the social model have pointed out that the impairment/disability dichotomy upon which it is premised is problematic, most notably in failing to attend to the experience of embodiedness.²⁶ As Michael Oliver, one of the founders of the social model, exclaimed, “disablement is nothing to do with the body.”²⁷ In focusing on the social exclusion and disadvantage of people with impairments, the body is erased as a legitimate focus of attention. As a direct response to biomedical conceptions of disability, in which disability is located squarely within individual bodies and minds and caused by biological deficits, this is understandable. However, for a number of scholars working within disability studies, the experience, limitations, and complexities of one’s body need to be acknowledged.²⁸ According to Liz Crow,

[a]s individuals, most of us simply cannot pretend with any conviction that our impairments are irrelevant because they influence every aspect of our lives. We must find a way to integrate them into our whole experience and identity for the sake of our physical and emotional well-being, and, subsequently, for our capacity to work against Disability.²⁹

Acknowledging this insight, a range of critical disability scholars have posited that we need to adopt a more holistic approach to disability where disability is understood “as an interaction between individual and structural factors.”³⁰ This conception allows us to bring the body back in, not in a reductionist, biomedical way, but a way in which one’s experience of one’s body and mind in relation to broader political, cultural, and environmental structures are made evident. As Shakespeare writes, disability,

... is always the combination of a certain set of physical and mental attributes, in a particular physical environment, within a specified social relationship, played out within a broader cultural and political context, which combines to create the experience of disability for any individual or group of individuals.³¹

²⁵ *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at para 30.

²⁶ See, for example, Carol Thomas, *Sociologies of Disability and Illness: Contested Ideas in Disability Studies and Medical Sociology* (New York: Palgrave Macmillan, 2007); Susan Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability* (London: Routledge, 1996); Rosemarie Garland Thomson, “Misfits: A Feminist Materialist Disability Concept” (2011) 26:3 *Hypatia* 591; Alison Kafer, *Feminist, Queer, Crip* (Bloomington, IN: Indiana University Press, 2013).

²⁷ Michael Oliver, *Understanding Disability: From Theory to Practice* (London: Red Globe Press, 1996) at 42.

²⁸ See, for example, Thomas, *supra* note 26; Wendell, *supra* note 26; Thomson, *supra* note 26.

²⁹ Liz Crow, “Renewing the Social Model of Disability” (1992) *Coalition News: Greater Manchester Coalition of Disabled People* 5 at 7.

³⁰ Shakespeare, *supra* note 22 at 55.

³¹ *Ibid* at 58.

Arguably, the *Convention on the Rights of Persons with Disabilities* (CRPD) adopts this understanding of disability in its Preamble, which recognizes that “disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.”³²

Thus, it is critical to examine the ways in which people whose bodies and minds differ from the norm are marked for discrimination, socially excluded, subject to oppression and disadvantage, and deprived of what they need to live and thrive. At the center of this approach, as David T Mitchell and Sharon L Snyder suggest, is the goal of “social recognition,” characterized by inclusionist practices and civil-rights policy work.³³ However, going beyond this, inclusion is only meaningful “if disability becomes more fully recognized as providing alternative values for living that do not simply reify reigning concepts of normalcy.”³⁴ Disability, understood in this way, is something “positively claimed and lived-within,”³⁵ directing all of us to other ways of being, knowing, and doing.

C. BARRIERS TO ACCOMMODATION OF STUDENTS WITH DISABILITIES IN CLINICAL EDUCATION IN LAW SCHOOL

Notwithstanding the increase in the number of students with disabilities attending law school, there continue to be barriers to their inclusion in its academic and social life. Some of these barriers are linked to the ableism that continues to underlie the attitudes, stereotypes, and stigma that inform the treatment of students with disabilities. As stated by the Ontario Human Rights Commission, “ableist attitudes are often premised on the view that disability is an ‘anomaly to normalcy,’ rather than an inherent and expected variation in the human condition.”³⁶ This belief that disability is an abnormality or deviance from the norm is often used to rationalize exclusion rather than to seek out means of integration and full participation that accommodate difference. Moreover, even in those circumstances where measures are taken to accommodate a student or enhance their inclusion, they are often met by others with suspicion or allegations of unfairness as attempts to “game the system” and receive benefits, giving the student an unfair advantage in the competitive law school environment.³⁷ In addition to confronting barriers attributable to ableism (explicit or implicit), other barriers may be the result of poorly designed and implemented policy and program initiatives and physical barriers which leave students with disabilities excluded. In order to include law students with disabilities in clinical programs attention needs to be given to the attitudinal,

³² *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UNGAOR, 61st Sess (2007), online: <refworld.org/docid/45f973632.html> [perma.cc/TP3F-WW7L].

³³ David T Mitchell & Sharon L Snyder, *Biopolitics of Disability: Neoliberalism, Ablenationalism and Peripheral Embodiment* (Ann Arbor, MI: University of Michigan Press, 2015) at 2.

³⁴ *Ibid* at 5.

³⁵ Jay Timothy Dolmage, *Academic Ableism: Disability and Higher Education* (Ann Arbor, MI: University of Michigan Press, 2017) at 70.

³⁶ OHRC Education Policy, *supra* note 10 at 7.

³⁷ Gregg, Kelly, Sullivan & Woolstencroft: The Strategic Counsel, “A Report to the Law Society of Upper Canada; Access Research Consultation” (August 2005), Appendix 1 in the Law Society of Upper Canada, “Students and Lawyers with Disabilities – Increasing Access to the Legal Profession –Report of the Disability Working Group” (December 2005) at 61, online: *The Law Society of Ontario*

<lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/s/students_and_lawyers_with_disabilities_-_increasing_access_to_the_legal_profession.pdf> [perma.cc/QJ2F-7XU5] [“LSUC Access Research Consultation”].

programmatic/policy, and physical barriers (often overlapping) that might operate to dissuade them from applying to such programs, and also to the conditions of the placement that would hinder their inclusion and success.

Empirical evidence about the barriers law students confront in applying to and performing in clinical placements is lacking. However, it is possible to extrapolate as to what some of these barriers might be from examining data collected to identify barriers for persons with disabilities entering and practising in the legal profession in Canada. In a 2000 study, *Lawyers with Disabilities: Identifying Barriers to Equality*, the Law Society of British Columbia reported that respondents identified three classes of barriers: discrimination, prejudice, and access barriers.³⁸ Among these, discrimination was the most prevalent (58%), followed by prejudice (23.2%) and access barriers (18.8%). Within individual categories, respondents reported more specific barriers. Discrimination included: lack of accommodation and support (32.2%); difficulty finding employment (19.7%); being told that accommodations were considered to be too expensive (11.9%); disclosure of disability leading to adverse treatment (14.7%); being marginalized into sole practice (10.7%); and instances of harassment (3.4%). Prejudice was encountered on the part of both lawyers and judges (68.0%) and was characterized as an unawareness of disability issues (15.6%). Access barriers included both structural barriers (80.8%) and social barriers (19.2%).³⁹ While some of these issues are of less direct relevance to the clinical placement, and there are other issues regarding programming that are not identified, a number of the barriers highlighted by the report illustrate the context into which a number of law students are being placed, and draw attention to the possible barriers they may confront during their clinical placements which need to be addressed by the law school supervisor, clinical program coordinator, and/or disability services coordinator.

Our review of the literature on clinical or practicum placements in various disciplines,⁴⁰ as well as our own experience with students, confirms the continued existence of the barriers highlighted in the Law Society of British Columbia Report (BC Report), and identifies additional attitudinal, policy, and structural barriers faced by law students in clinical settings. There is a general consensus that timely disability disclosure by students prior to a clinical placement is essential to obtaining accommodation. However, the timing of disability disclosure was identified in some literature about clinical placements in general as problematic for the student. First, it has been noted that identifying as having a disability during the application and selection period can dissuade some programs from offering a placement to a student.⁴¹ In addition, once offered a clinical position, some students with disabilities are reluctant to disclose for fear that disclosure will have a negative impact on future career opportunities.⁴² Students also express concern that their placement supervisor and/or academic program director, upon whom they are dependent for

³⁸ The Law Society of British Columbia (LSBC), “Lawyers with Disabilities: Identifying Barriers to Equality” (2001), online: <lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/DisabilityReport.pdf> [perma.cc/6XTE-GTDW].

³⁹ *Ibid* at 20.

⁴⁰ Eilionoir Flynn, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (London: Routledge, 2016) at 117; Alexis Anderson & Norah Wylie, “Beyond the ADA: How Clinics Can Assist Law Students with Non-Visible Disabilities to Bridge the Accommodations Gap Between Classroom and Practice” (2008) 15 Clinical L Rev 1.

⁴¹ The Law Society of Upper Canada, “Students and Lawyers with Disabilities – Increasing Access to the Legal Profession –Report of the Disability Working Group” (2005) at 26, online: *The Law Society of Upper Canada* <lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/s/students_and_lawyers_with_disabilities_-_increasing_access_to_the_legal_profession.pdf> [perma.cc/8A98-PDHA] at 44.

⁴² *Ibid* at 22.

letters of reference, will rate their performance less positively if accommodations are requested, or will reveal their use to possible employers.⁴³ Additionally, law students, many of whom are acculturated to “the economic bottom line of the legal profession,”⁴⁴ come to expect that accommodations will not be forthcoming for articling or afterwards, and therefore do not request them for clinical placements.⁴⁵

In circumstances where students decide to disclose a disability for the purpose of receiving accommodations, issues arise about whether it is the responsibility of the student, the academic program director, or the coordinator of disability accommodations at the law school to inform the placement site about the student’s disability. Research undertaken with social work students, for example, shows that while some students are of the view that requiring the faculty or program to inform, and indeed to evaluate, placements regarding their ability and readiness to accommodate students with specific disabilities is desirable, other students are of the view that such disclosure encourages bias on the part of the placement.⁴⁶

Additional examples of possible stigma and discrimination in the disclosure and accommodation-seeking process include placement sites that are not familiar with accommodating persons with disabilities and that may not have accommodation policies and procedures in place. Indeed, among private sector employers there seems to be a lack of knowledge about disabilities generally. Literature regarding the experience of articling students notes that the lack of knowledge on the part of employers regarding accommodation was identified as a barrier to access for advancing the professional opportunities of lawyers with disabilities.⁴⁷ Employers in the private sector were less likely than their government and quasi-government counterparts to have accommodation policies.⁴⁸ In addition, issues about the cost and complexity of accommodation were raised more by private sector employers than by those in the government or quasi-government sectors.⁴⁹

For students with disabilities “[f]acing discrimination and stigma in accommodation-seeking becomes an added exertion *on top of* students expected academic and social obligations in the post-secondary environment.”⁵⁰ Educators, program directors, and those responsible for external placements must consider and acknowledge the energy, effort, time, and resources that students with disabilities continually expend in articulating their accommodation and accessibility needs, including in a clinical context, which they would otherwise use for academic, extra-curricular, and social pursuits. Indeed, responsibility needs to be taken on by the academic institution and the placement setting for troubleshooting and navigating a number of the accommodation-related issues.

Law students with disabilities with whom we have spoken have identified specific examples of ableist attitudes they have encountered during clinical placements. People with disabilities often face quotidian microaggressions, since stereotypes about living with a disability are so deeply ingrained in our culture. For example, singling out a student with a disability as an inspiration for performing what students without a disability do is just as problematic as patting

⁴³ These comments have been reported in conversations with students.

⁴⁴ The Law Society of Upper Canada, *supra* note 41 at 44, citing LSBC, *supra* note 38.

⁴⁵ LSUC Access Research Consultation, *supra* note 37 at 13-15.

⁴⁶ Linda Cherrey Reeser, “Students with Disabilities in Practicum” (1992) 28:1 J Soc Work Educ 98.

⁴⁷ REACH, *Advancing Professional Opportunities and Employment Accommodation* (Ottawa: Reach Canada, 2001) as cited in *supra* note 39 at 22.

⁴⁸ LSUC Access Research Consultation, *supra* note 6 at 5.

⁴⁹ The Law Society of Upper Canada, *supra* note 41 at 43.

⁵⁰ National Educational Association of Disabled Students, *supra* note 16 at 46.

that student on the head for good performance or denying them the same quality of work as another student because of their disability. Likewise, using language that implies that disability is a negative trait—that people with disabilities are suffering, that their lives are not worth living, diminished or a burden—is problematic. Equally problematic is appropriating disability language to express seemingly mundane things e.g., “I’m so spastic today” or “I’m having an OCD day.”

Law students with disabilities report difficulties with being regarded by their supervisors, fellow students, and others as the future professional in clinical programs (and articling positions).⁵¹ They are instead seen as the client or recipient of service. This can be a subtle attitudinal bias flowing from the cultural assumption embedded in Western history, thought, and media that in the legal arena it is the clients who have disabilities not the lawyers. This attitude is exacerbated in social justice settings, such as community clinics, where students with high social capital expect to help those with low social capital (often clients with disabilities).⁵² As Simmons and MacGregor note, “[h]ow do students with disabilities fit into a model that is predicated on the notion of the abled helping the disabled?”⁵³ How does one develop a professional persona as a lawyer with a disability in a context where one’s identity is associated with being the client in need rather than the learner or provider of the service?

This difficulty in seeing a student with a disability in the role of a lawyer, with a choice about their own practice area, is manifest when students encounter supervisors who make assumptions about their future employment prospects and limit their exposure during their placement to only certain kinds of experiences and training that the supervisor deems suitable for a person with a disability. In the context of articling, some students with disabilities reported that they were not given the same quality of work or opportunities as non-disabled students.⁵⁴ Supervising lawyers should not make assumptions about the future employment prospects of the student during the placement. Their obligation is to accommodate the student to enable them to fulfill the responsibilities and requirements of the position, leaving decisions about future practice to the student.

While attitudinal barriers are the most prevalent form of barrier law students in a clinical setting are likely to encounter, there are possible physical barriers too. Arrangements will need to be made in a timely way to ensure that students have access to the required accommodations at their placement site to provide for their needs. This may involve a variety of resources or adaptations including: materials in alternate formats; assistive technologies; office adaptations (*i.e.*, to lighting, chair, or keyboard); or furniture placement to facilitate a mobility device. For some students, the location of a clinical placement may constitute an additional barrier where, for example, remoteness is an issue or where for other reasons car transportation is required and poses an accessibility barrier for students with disabilities. These circumstances remind us of the importance of incorporating universal design principles,⁵⁵ discussed more fully in Part IV, into clinic placement planning. Car travel is not only a barrier to participation for students with

⁵¹ Simmons & MacGregor, *supra* note 23 at 30.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ The Law Society of Upper Canada, *supra* note 41 at 44.

⁵⁵ Helen La, Patti Dyjur & Haboun Bair, “Universal Design for Learning in Higher Education” (2018), online: *University of Calgary* <[taylorinstitute.ucalgary.ca/sites/default/files/UDL-guide_2018_05_04-final%20\(1\).pdf](http://taylorinstitute.ucalgary.ca/sites/default/files/UDL-guide_2018_05_04-final%20(1).pdf)> [perma.cc/M6NE-HNG4]; Robert D Black, Lois A Weinberg & Martin G Brodwin, “Universal Design for Learning and Instruction: Perspectives of Students with Disabilities in Higher Education” (2015) 25:2 *Exceptionality Educ Intl* 1; Jaellayna Palmer & Aldo Caputo, “Universal Instructional Design Implementation Guide” (2002-2003), online: <opened.uoguelph.ca/instructor-resources/resources/uid-implimentation-guide-v13.pdf> [perma.cc/QRV6-S474].

disabilities but also for other students who are not able to drive to the location for a variety of reasons: not knowing how to drive; not having access to a vehicle; or having a suspended license are a few examples. Not all travel barriers, however, are due to remoteness. Some students with disabilities rely on specialized transportation or paratransit services (like WheelTrans in Toronto or Para Transpo in Ottawa) to get them to and from their placement site. This form of transportation provided only for persons with disabilities is notoriously unreliable, late, and available only with pre-planning and booking, making reliance on timely and on-demand transportation a substantial barrier for students who rely on paratransit services.

II. LEGAL FRAMEWORK: THE HUMAN RIGHTS OBLIGATIONS OF CLINICAL EDUCATION PROVIDERS

This section is inspired by the Ontario Human Rights Commission's work on education and disability⁵⁶ and provides a legal analysis of the accommodation requirements for students with disabilities in clinical legal education placements, relying on doctrinal understandings of human rights obligations. Rights-protecting instruments in Canada, including the *Canadian Charter of Rights and Freedoms (Charter)*,⁵⁷ the *Ontario Human Rights Code (Code)*,⁵⁸ and the *Canadian Human Rights Act (CHRA)*⁵⁹ explicitly enumerate disability as an impermissible ground of discrimination. Even though the ground of disability is set out in law, it may not always have practical significance. There is a wide gap between the law on the books and law in action, particularly for persons with disabilities.⁶⁰

A. JURISDICTION AND THE IDENTIFICATION OF THE APPROPRIATE RESPONDENT

Ontario's *Human Rights Code* establishes students' right to access educational services without discrimination due to a disability.⁶¹ While the term "services" is not defined it is clear that education is a service pursuant to the *Code*, even when students are participating in off-campus training programs in clinical settings. As such, universities' duty to accommodate extends to "off-campus coursework such as fieldwork, placement, internship and out-of-the classroom learning experiences."⁶² However, since clinical placement sites are partners in the provision of educational services, they are required to play an active role, together with the University, in the

⁵⁶ OHRC Education Policy, *supra* note 10.

⁵⁷ *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

⁵⁸ *Human Rights Code*, RSO 1990, c H 19, s 10 [*Code*].

⁵⁹ *Canadian Human Rights Act*, RSC 1985, c H-6.

⁶⁰ Law Commission of Ontario, "Framework for the Law as it Affects Persons with Disabilities" (2012) at 28, online: *Law Commission of Ontario* <www.lco-cdo.org/wp-content/uploads/2012/12/disabilities-framework.pdf> [perma.cc/99QQ-7B6A]; See also about the experience of persons with mental health issues, Michael Bay, "Making the Law Match the Reality; Making the Reality Match the Law" (2006) 1:1 J of Ethics in Mental Health 1 at 4.

⁶¹ *Code*, *supra* note 58 at s 10.

⁶² McMaster University, "Academic Accommodation of Students with Disabilities" (2017) at 19, online: <secretariat.mcmaster.ca/app/uploads/Academic-Accommodations-Policy.pdf> [perma.cc/VE6C-YHV2].

accommodation process. The onus of responsibility is on the university to provide training and guidance to clinical placement sites regarding students' needs for accommodation.⁶³

Universities and placements sites are also required to "support accommodation measures regardless of collective agreements unless to do so would create undue hardship."⁶⁴ The Alberta Human Rights Commission writes:

Who is responsible for facilitating the accommodations in clinical and practicum placements: the institution or the practicum provider? The institution is responsible for facilitating accommodation in clinical and practicum placements. The organization providing the placement is viewed as an agent of the institution for the purposes of providing the service. However, both the institution and practicum provider bear the burden [sic] of finding a reasonable accommodation.⁶⁵

Since the clinical placement site has agreed to participate in this educational process, it is obligated to allow the accommodation.⁶⁶ Ideally, all parties, including the university and the clinical placement site, should "work together to develop effective accommodations toward an accessible learning experience"⁶⁷ and "collaborate on the development of an appropriate accommodation plan that meets the student's needs."⁶⁸ Failure to accommodate a student with a disability in a clinical legal education placement may constitute discrimination. It is to an analysis of this that we now turn.

B. THE *PRIMA FACIE* TEST FOR DISCRIMINATION

This section considers the human rights implications of a failure to accommodate a student with a disability in a clinical placement. A student bringing a human rights complaint (an Applicant) must first demonstrate that, assuming the allegations to be true, there is discrimination. To make out a *prima facie* case, they must satisfy the three-part test articulated by the Supreme Court in *Moore v BC*.⁶⁹

⁶³ Adam A Milani, "Disabled Students in Higher Education: Administrative and Judicial Enforcement of Disability Law" (1996) 22:4 JC & UL 989.

⁶⁴ OHRC Education Policy, *supra* note 10 at 72: "Unions, professional associations, and *third-party educational service providers* are required to: i) take an active role as partners in the accommodation process, ii) facilitate accommodation effort, iii) support accommodation measures regardless of collective agreements unless to do so would create undue hardship." [emphasis added]

⁶⁵ Alberta Human Rights Commission, "Duty to Accommodate Students with Disabilities in Post-Secondary Educational Institutions: Interpretive Bulletin" (2010) at 15, online: <albertahumanrights.ab.ca/Documents/Bull_Duty_to_accom_students.pdf> [perma.cc/8Y3X-NBSF].

⁶⁶ Beth Oakley, Jeanette Parsons & Maureen Wideman, "Identifying Essential Requirements: A Guide for University Disability Service Professionals" (13 June 2012) at 11, online: <queensu.ca/studentaffairs/sites/webpublish.queensu.ca.vpsawww/files/files/idiaguide.pdf> [perma.cc/2W82-SYYE].

⁶⁷ Barbara Roberts et al, "Defining a New Culture: Creative Examination of Essential Requirements in Academic Disciplines and Graduate Programs" (2015), online: <cags.ca/documents/publications/3rdparty/Discussion%20paper%20Essential%20Requirements%20FINAL%202014-09-22.pdf> [perma.cc/7AMX-S68S].

⁶⁸ McMaster University, *supra* note 63 at 19

⁶⁹ *Moore v British Columbia (Ministry of Education)*, 2012 SCC 61 at para 33 [*Moore v BC*].

An Applicant must first establish on a balance of probabilities that they had a disability at the time of the alleged discriminatory treatment. The *Code*'s definition of disability is broad. Mental health issues with temporary manifestation may be sufficient to establish disability. PTSD constitutes a "disability" within the meaning and protection of human rights legislation like the *Code*.⁷⁰ However, a "bare assertion of 'stress'" may not be entitled to protection.⁷¹ An addiction may also constitute a disability.⁷² In Ontario, the *Code*'s definition includes "perceived disability"⁷³ and conditions that do not cause functional limitations, an important protection for persons who do not identify as having a disability.⁷⁴ Clinical program directors and those responsible for placements need to be aware of the expansive definition of "disability."

Second, the Applicant must demonstrate that they experienced an adverse impact. Discrimination against law students with disabilities can operate directly, in the form of an explicit exclusion. Discrimination can also operate through adverse impacts. A neutral rule, standard, policy, practice, or requirement, including a zero-tolerance attendance policy, may disproportionately impact law students with disabilities. Consider the experience of a law student who is unable, because of their disability-related need, to attend a full-time external placement. A participation grade may disproportionately impact students with some kinds of disabilities that interfere with making contributions in class.

Third, the Applicant must demonstrate that the protected characteristic was a factor in their treatment. In *Stewart v Elk Valley*, a workplace policy required employees to disclose dependence or addiction issues.⁷⁵ Mr. Stewart did not disclose his drug use, tested positive after a workplace incident, and his employment was terminated. He alleged that he was terminated for an addiction disability in contravention of the *Alberta Human Rights Act*. The Alberta Human Rights Tribunal dismissed his complaint, finding that his employment was terminated for breaching the workplace policy, and not because of his addiction disability. The Supreme Court upheld the Tribunal's decision, and relied on its finding that Mr. Stewart had "the capacity to make choices" about his drug use.⁷⁶ In a powerful dissent, Justice Gascon found that the determination depended on whether Mr. Stewart's addiction played *any* role in the termination.⁷⁷

C. THE TEST FOR UNDUE HARDSHIP

Once a *prima facie* case of discrimination has been established, the burden shifts to the Respondent to justify the conduct, policy, or practice. A Respondent must accommodate the Applicant's disability-related needs to the point of undue hardship. The *Code* prescribes three considerations in assessing whether an accommodation would cause an undue hardship: cost, outside sources of

⁷⁰ *Krieger v Toronto Police Services Board*, 2010 HRTO 1361.

⁷¹ *Crowley v Liquor Control Board of Ontario*, 2011 HRTO 1429 at para 62.

⁷² *Entrop v Imperial Oil Limited*, (2000) 50 OR (3d) 18.

⁷³ *Code*, *supra* note 58 at s 10.3.

⁷⁴ Ontario Human Rights Commission, "Minds that Matter: Report on the Consultation on Human Rights, Mental Health and Addictions" (2012), online:

ohrc.on.ca/sites/default/files/Minds%20that%20matter_Report%20on%20the%20consultation%20on%20human%20rights%2C%20mental%20health%20and%20addictions.pdf [perma.cc/ML7N-SXMV] at 15: "I have a diagnosis but don't consider myself disabled"

⁷⁵ *Stewart v Elk Valley Coal Corp*, 2017 SCC 30.

⁷⁶ *Ibid* at para 34.

⁷⁷ *Ibid* at para 120.

funding, and health and safety risks.⁷⁸ Business inconvenience and customer preferences are excluded from consideration.⁷⁹ Appropriate accommodations support students “to meet the essential requirements of the field placement successfully.”⁸⁰ In educational settings, common accommodations include the availability of a note taker, extended time for test-taking, a separate room for test-taking, and recorded lectures.

A student in a clinical placement is legally guaranteed accommodation of their disability-related needs. Accommodation deserves individual consideration, and a one-size-fits-all approach must be avoided. There is a “virtually infinite variety” of disability-related needs, and approaches to accommodation must be individualized.⁸¹ Because students with disabilities may have periods of ability and disability, universities must evaluate requests for accommodation on a case-by-case basis.

An undue hardship assessment must be based on objective evidence.⁸² The assessment must avoid the influence of myths about persons with disabilities, including as unable to tolerate pressure in the workplace. The duty to provide a safe workplace does not displace the duty to accommodate. The standard is not one of absolute safety and “risk has a limited role.”⁸³ When disciplining for misconduct, employers (and educators) must consider whether their behaviour, including missed deadlines or poor attendance, is disability-related.

Generally, the duty to accommodate is not triggered when accommodation is not requested by a student. Accommodation is a “two-way street,”⁸⁴ requiring the student to communicate the nature of their disability, though not the specifics.⁸⁵ Failing to disclose disability-related needs does not disentitle an Applicant from human rights protection where the educational institution “ought to have known”⁸⁶ or received constructive notice.⁸⁷ The institution and the placement setting may be required to make proactive inquiries. For example, even if a prospective student has not disclosed a disability-related need about their mental health that interferes with their regular attendance, the educational institution or the clinical placement can be considered to have received constructive notice if the student cried at work.⁸⁸

1. SCOPE OF DISCLOSURE, CONFIDENTIALITY & CROSS DISCLOSURE OF ACCOMMODATION DETAILS

⁷⁸ *Code*, *supra* note 58 at s 11.2.

⁷⁹ Ontario Human Rights Commission, “Fact Sheet: How Far Does the Duty to Accommodate Go?” online: <ohrc.on.ca/en/resources/factsheets/disability4> [perma.cc/J2CK-74UD].

⁸⁰ Roberts et al, *supra* note 67 at 8.

⁸¹ *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 at para 81.

⁸² Ontario Human Rights Commission, “Policy on Preventing Discrimination Based on Mental Health Disabilities and Addictions” (2014), online:

<ohrc.on.ca/sites/default/files/Policy%20on%20Preventing%20discrimination%20based%20on%20mental%20health%20disabilities%20and%20addictions_ENGLISH_accessible.pdf> [perma.cc/VU9N-MHUC] at s 58.

⁸³ *Grismer (British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at 41 at para 30 [Grismer].

⁸⁴ *Matthews v Chrysler Canada*, 2011 HRTO 2053 at para 48.

⁸⁵ Ontario Human Rights Commission, “New Documentation Guidelines for Accommodating Students with Mental Health Disabilities” (6 January 2016), online: <ohrc.on.ca/en/news_centre/new-documentation-guidelines-accommodating-students-mental-health-disabilities> [perma.cc/GY9D-L952].

⁸⁶ *Mager v Louisiana-Pacific Canada Ltd*, 1998 BCHRT 34 at para 63.

⁸⁷ *Zaryski v Loftsgard* (1995) 22 CHRR D/256 (Saskatchewan BOI) at para 17.

⁸⁸ *Willems-Wilson v Allbright Drycleaners*, 1997 BCHRT 39.

Students requesting accommodations are required to provide enough information about their disability-related needs to receive academic accommodations in their clinical placement. However, there may be questions about the scope of information that law students need to disclose to receive accommodations. Following the settlement of a Human Rights Tribunal of Ontario (HRTO) application brought by Navi Dhanota against York University,⁸⁹ students are no longer required to disclose the medical details of their diagnosis to receive accommodations and supports.⁹⁰ The focus of the inquiry should be on the limitations or needs associated with the disability in relation to the performance of the essential academic requirements.⁹¹

In general terms, universities should have an obligation to maintain the confidentiality and privacy of students with disabilities and their personal information. Policies and practices should be established to ensure that students are not required to share their personal medical information or to request accommodations directly from their professors. Disability service offices should communicate relevant information about individual student accommodation needs to professors. In the context of clinical placements, questions about the disclosure of student information in the hands of the educational institution with the external placement arise (as discussed in section III.c below). This issue is particularly germane in balancing students' concerns about potential ableism upon the disclosure of a disability versus the desire on the part of others for speedier access to needed accommodations at a placement site that could be facilitated with communication and coordination between the placement and the law school.

2. WHO FUNDS THE COST OF ACCOMMODATION?

A cost is "undue" if it is so high that it changes the organization's essential nature.⁹² What may be an undue cost for a small business may not be undue for a larger one. The Supreme Court has warned against putting too low a value on accommodation, since it "is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment."⁹³

Apart from questions about what constitutes "undue," there is confusion with respect to who bears the responsibility for the cost and provision of accommodation to post-secondary students with disabilities. The Ontario Human Rights Commission sets out that pursuant to the *Code*, "the determination of who the service provider is in a particular situation will be a factual determination, and will vary from case to case. In most cases, it will be the post-secondary institutions, in some it may also be the Ministry of Training, Colleges and Universities."⁹⁴

Generally, universities are required to pay for at least part of the cost of accommodations for clinical placements. In *Dunkley v UBC*, the British Columbia Human Rights Tribunal (BCHRT) considered the University of British Columbia (UBC)'s failure to provide American

⁸⁹ Diana Zlomislis, "York University student wins mental-health fight," *Toronto Star* (12 January 2016), online: <thestar.com/news/gta/2016/01/12/york-university-student-wins-mental-health-fight.html>.

⁹⁰ York University, "Media Release: New Documentation Guidelines for Accommodating Students with Mental Health Disabilities" (6 January 2016), online: <news.yorku.ca/2016/01/06/new-documentation-guidelines-for-accommodating-students-with-mental-health-disabilities> [perma.cc/NN9U-L5GD].

⁹¹ OHRC Education Policy, *supra* note 10 at 98.

⁹² Ontario Human Rights Commission, "How far does the duty to accommodate go?," online: <<http://www.ohrc.on.ca/en/how-far-does-duty-accommodate-go-fact-sheet>> [perma.cc/DXQ5-2Y4H].

⁹³ *Grismer*, *supra* note 83 at 41.

⁹⁴ Ontario Human Rights Commission, "Education Funding for Students with Disabilities," online: <ohrc.on.ca/en/education-funding-students-disabilities> [perma.cc/BUH4-BJBM].

Sign Language (ASL) interpretation to a medical resident.⁹⁵ While a medical student at the University of Ottawa, Jessica Dunkley had access to ASL interpretation in class and during clinical sessions. When she was assigned a dermatology residency at UBC, there was confusion about the respective roles of the Post Graduate Medical Education Office in the Faculty of Medicine and UBC's Access and Diversity Office. UBC's Faculty of Medicine determined that the projected costs of an interpreter would be too high and refused to pay for the cost of interpretation. Dunkley completed part of the rotation without interpretation, and then went on leave. The BCHRT held that UBC's failure to provide interpretation amounted to discrimination and there was no *bona fide* and reasonable justification. The duty fell to both UBC and the hospital to accommodate Dunkley's disability.⁹⁶ The BCHRT found that universities must identify students' needs, determine how to meet those needs while they are on campus and in placement hospitals, and then determine who is going to pay.

3. ESSENTIAL EDUCATIONAL REQUIREMENTS

Students are entitled to accommodations to fulfill the essential academic and non-academic requirements of their program. Institutions are not required to lower standards or waive academic or non-academic requirements in order to accommodate a student with a disability. However, they must demonstrate that the course requirements and levels of performance in question are essential to the program of study. Before refusing a request to waive or alter standards or to offer additional accommodations, programs need to provide evidence that that standard is an essential requirement of the program. Because of the distinct nature of individual program requirements, individual disability-related needs and the way they intersect to create potential accommodation needs, there are no universal accommodation requirements.⁹⁷ A case-by-case assessment of a student's ability to perform the essential academic requirements must be undertaken, especially when a judgment is made that no alternative exists to accommodate that person's specific disability.

The determination of an essential educational requirement necessitates careful scrutiny, because universities or programs "may be too quick to jump to the conclusion that a course requirement or standard is essential."⁹⁸ At the post-secondary level, it might be essential that a student master core aspects of a course curriculum. It is, however, less likely that it will be essential "to demonstrate that mastery *in a particular format*."⁹⁹ The determination of whether a requirement is essential depends on "whether performing the task in an alternative manner might interfere with the student's successful performance in the discipline, program or course"¹⁰⁰ or "whether altering how a task is completed will compromise the objective of the task."¹⁰¹

The Supreme Court of Canada in *Grismer* articulated the three-part test for an essential requirement. First, is the requirement rationally connected to the task (objective of the program)? Second, was the requirement established in an honest and good faith belief in its necessity (*i.e.*, not arbitrary but sincerely considered important)? Finally, is the requirement reasonably necessary

⁹⁵ *Dunkley v UBC and another*, 2015 BCHRT 100 at para 765.

⁹⁶ *Ibid* at para 727.

⁹⁷ Roberts et al, *supra* note 67 at 6.

⁹⁸ OHRC Education Policy, *supra* note 10 at 64.

⁹⁹ *Ibid* [emphasis added].

¹⁰⁰ Roberts et al, *supra* note 67 at 4.

¹⁰¹ *Ibid*.

for the completion of the task, and what is the evidence for the necessity of doing the requirement in a particular fashion?¹⁰²

An essential requirement does not preclude its completion with accommodation, and the “determination of essential requirements is independent of the determination of undue hardship.”¹⁰³ Accommodation should be provided where an essential requirement “can be achieved with the use of an accommodation or by flexibility in the means of performance.”¹⁰⁴ For example, Carl Kelly was a medical student who was terminated from the UBC medical residency program for failure to pass certain rotations.¹⁰⁵ He required accommodation of his ADHD and other disabilities to complete his rotations within various teaching hospitals and community practices. The BCHRT found that UBC’s decision to terminate Kelly’s residency was based on an inadequate analysis of whether it could accommodate Kelly’s disability, and a flawed assessment of whether he could successfully complete the requirements of UBC’s medical residency program. The BCHRT found that the decision was based on an “impressionistic conclusion” that providing the accommodation would fundamentally alter the program or lower its professional standards. The BCHRT held there was no substantive factual foundation to support a conclusion that he could not fulfill the program’s essential requirements.¹⁰⁶ The BCHRT made the largest award to date in BC for injury to dignity. The British Columbia Supreme Court upheld the Tribunal’s finding but set aside the award,¹⁰⁷ though the British Columbia Court of Appeal restored the award.

4. HEALTH AND SAFETY

Safety considerations may be relevant to the duty to accommodate in clinical and practicum placements. The determination of health and safety risks requires careful attention to the placement’s context, including clients’ social location. There may be no apparent health and safety risks in a business law clinic. Safety, though, may be at the core of concerns in medical education, and programs are not required to make accommodations that would result in a threat to the health or safety of patients.¹⁰⁸ Care and consideration must be given to how safety is conceptualized to avoid ableist stereotypes about the risk posed by disability.

An assessment of risk posed by an individual student must avoid impressionistic conclusions. The risk must be quantifiable. Presumptions about the suitability of a student for the placement may be particularly pernicious where the student has a psychiatric history. The risk to safety must outweigh the negative impact of discrimination. In addition, the institution must also consider ways to reduce risk or consider other placements for the student that present less of a safety risk.

The university must not only identify and measure the risks to safety, but also determine who bears the risk. Risk that is limited to the student does not often amount to undue hardship.

¹⁰² *Grismer*, *supra* note 83.

¹⁰³ *Roberts et al*, *supra* note 67 at 11.

¹⁰⁴ *Ibid* at 5.

¹⁰⁵ *University of British Columbia v Kelly*, 2016 BCCA 271.

¹⁰⁶ *Kelly v University of British Columbia*, 2012 BCHRT 32 at para 536.

¹⁰⁷ *University of British Columbia v Kelly*, 2015 BCSC 1731.

¹⁰⁸ Lisa M Meeks & Neera R Jain, “Accessibility, Inclusion, and Action in Medical Education - Lived Experiences of Learners and Physicians With Disabilities,” Association of American Medical Colleges & University of California San Francisco (March 2018), online: <https://store.aamc.org/downloadable/download/sample/sample_id/249/> [perma.cc/E2ND-W8HT].

Risk to other persons may. Those risks “must not contravene statutory occupational health and safety and workers’ compensation requirements.”¹⁰⁹

D. SELF-ADVOCACY, SELF-ACCOMMODATION AND ACCOMMODATION MODELS

Students with disabilities are forced to self-advocate, and that skill “remains critical to the accommodation model for students with disabilities to gain access.”¹¹⁰ There are emergent questions about the scope of the obligation to “self-accommodate,” flowing from troubling jurisprudence about the test for family status discrimination. *Johnstone v Canada (Border Services)* involved a full-time employee of the Canadian Border Services Agency (CBSA) who worked unpredictable shifts. After she returned from maternity leave, she requested accommodation in the form of fixed day shifts. According to CBSA policy, working fixed shifts would have reduced the number of hours available to her and she would have had to move to part-time employment, thereby disentitling her from full-time benefits. The Canadian Human Rights Tribunal, and confirmed by the Federal Court, found discrimination on the basis of family status. The Federal Court of Appeal upheld that decision but identified four factors that establish a *prima facie* case of workplace discrimination based on family status including, “that he or she has made reasonable efforts to meet childcare obligations through reasonable alternative solutions and that no such alternative solution is reasonably accessible.”¹¹¹ The Federal Court of Appeal found that the claimant had made significant efforts to find childcare that fit her unpredictable shifts. The Federal Court of Appeal required her to first self-accommodate, by attempting to reconcile her childcare obligations on her own. An employer’s accommodation obligations regarding family status arise after the employee has made efforts to self-accommodate.

Since *Johnstone*, some Courts have favoured requiring claimants to self-accommodate before seeking accommodation from their employer.¹¹² In *Misetich v Value Village Stores*, the Human Rights Tribunal of Ontario found that an assessment of whether a claimant had made reasonable efforts to meet family care obligations does not belong at the *prima facie* discrimination stage.¹¹³ The Ontario Human Rights Commission also made submissions arguing that *Johnstone v Canada Border Services* “set out an onerous and unique test for establishing discrimination on the basis of family status.”¹¹⁴ The HRTO agreed with the OHRC’s submissions that the Federal Court of Appeal’s formulation of the test in *Johnstone* imposes an “unduly onerous burden on applicants,”¹¹⁵ stating: “I do not agree that in order to prove discrimination, an applicant must establish that he or she could not self-accommodate the adverse impact caused by a workplace

¹⁰⁹Alberta Human Rights Commission, *supra* note 65.

¹¹⁰ NEADS Accessibility and Accommodation, *supra* note 16 at 47.

¹¹¹ *Johnstone v Canada (Border Services)*, 2014 FCA 110.

¹¹² See, for example, *Flatt v Canada (Attorney General)*, 2015 FCA 250.

¹¹³ *Misetich v Value Village Stores*, 2016 HRTO 1229 [*Misetich*].

¹¹⁴ Ontario Human Rights Commission, “Summary: *Misetich v. Value Village – Discrimination on the basis of family status*” (2016), online: <ohrc.on.ca/en/summary-misetich-v-value-village-%E2%80%93-discrimination-basis-family-status> [perma.cc/V9QQ-26BH].

¹¹⁵ *Ibid.*

rule.”¹¹⁶ The Alberta Court of Queen’s Bench also rejected additional tests of self-accommodation in *SMS Equipment Inc v Communications, Energy and Paperworkers Union*.¹¹⁷

Applying the reasoning from the ground of family status to the ground of disability, it is troubling to require students to self-accommodate before seeking an accommodation from the education institutions or their external placement should they desire accommodations. Relying on students to prove their disability, know their accommodation needs in an unfamiliar setting, know how to access required accommodations, advocate for themselves in cases of refusal, and educate clinical supervisors about disability and accommodation, while at times encountering ableist attitudes in the workplace, places an undue burden on law students with disabilities who, like other law students, are seeking to advance their legal education in the clinical environment. In addition, the accommodation process is often an onerous one, demanding time, effort, and energy of the student with disabilities.

III. ELEMENTS OF A SAMPLE POLICY

In responding to the legal obligations required by human rights legislation, and with knowledge of the barriers confronted by law students seeking participation in clinical education programs, we argue that law schools must develop transparent policies and procedures to accommodate students with disabilities in clinical programs. This section reviews suggested required elements of such an accommodation policy. It does not aim to develop a model policy, since approaches to academic accommodation at individual law schools are so distinct. However, an Agreement between each placement site and the law school is a central element of any accommodation policy. This list draws from the work of NEADS and the Association of American Medical Colleges.¹¹⁸ There are very few precedents regarding accommodation in clinical placements in general in Canada.¹¹⁹

A. DEVELOPMENT OF AN AGREEMENT BETWEEN THE UNIVERSITY AND THE EXTERNAL PLACEMENT

An Agreement should be made between each placement setting and the law school. The agreement should be developed in clear language, avoiding being overly legalistic. It should also emphasize

¹¹⁶ Misetich, *supra* note 113 at para 48.

¹¹⁷ *SMS Equipment Inc v Communications, Energy and Paperworkers Union*, 2015 ABQB 162. The BC Human Rights Tribunal also considered *Johnstone* in *Adair v Forensic Psychiatric Services Commission* (No 2), 2017 BCHRT 14.

¹¹⁸ Meeks & Jain, *supra* note 108.

¹¹⁹ Lakehead University, “Procedures Associated with the Policy on Accommodation and Access for Students with Disabilities/Medical Conditions” (January 2018), online:

lakeheadu.ca/sites/default/files/uploads/72/Procedures%20Accommodation%20and%20Access%20for%20Students%20with%20Disabilities_Medical%20Conditions%202018%20-021218.pdf [perma.cc/K6RU-HKD6] at 14;

“Accommodations for Research, Experiential, and Practicum Components of Study,” McMaster University, *supra* note 63 at 19; University of Alberta, “Field and Practicum Placement Accommodations,” online:

ualberta.ca/augustana/services/health/accessibility/students/course-accommodations/field [perma.cc/5S34-87KS].

See this example from the United States: University of North Carolina Hospitals, “Policy and Procedure: University of North Carolina Hospitals Graduate Medical Education Policy on Accommodation of Residents with Disabilities,” online:

med.unc.edu/gi/faculty-staff-website/teaching/fellowship-resources/appt-and-policies/gme-policies/accommodation-of-residents-with-disabilities [perma.cc/CB2V-26JS].

the role of mutual respect and trust, with particular attention to relationship building between the placement site and the University. The Agreement should include reference to the Law School's and the University's Accommodation Policies, as well as relevant accommodation policies at the placement setting. Academic Directors and Placement Directors or supervisors will need to review the respective accommodation policies to ensure that there is sufficient alignment to enable students with disabilities to meet program objectives with accommodation. Provisions of the Agreement should include detail about its review, renewal, and revision, including a statement about who has authority for devising, approving and updating it *i.e.*, Faculty Council or a standing committee dedicated to clinical and experiential learning.

B. SELECTION AND RECRUITMENT PROCESS

The law school administration, including an office of clinical education or clinic directors, should encourage students with disabilities to actively pursue clinical placements. Recruitment materials should be available in multiple formats, and details about the interview process should be clear. There must be attention paid to accessibility barriers, including where the interview is held and scent sensitivities policies. Prospective students should have the explicit opportunity to make accommodation requests. It should be made clear, however, that this inquiry is relevant to the accommodation needs for the interview process only. Prospective students should not be asked at this stage to disclose their accommodation needs for the placement itself. Placement decisions regarding a student with a disability must not be based on an assessment of a student's potential for future employment.

C. DISCLOSURE AND DOCUMENTATION

The Policy must contemplate the requirements for the documentation of disability, which depends on how disability is defined by the University Accommodation policy. The definition of disability should be broad, and account for emergent understandings of disability. University policies in different institutions may define disability differently; however at minimum, the definition in provincial human rights legislation should be used.

The Policy must contain a provision that the student's personal information, including information about their disability and any health information, will remain private and confidential. The Policy must establish a clear process for disclosing disability for the purpose of accessing accommodations, including to whom and when disclosure must be made. The Agreement may include detail about the timing of disclosure, and a statement of the value of early disclosure to avoid problems in the process. Students must be aware of the possibility of cross-disclosure between the university/law school and the placement and in what circumstances that cross-disclosure may occur. The Policy should confirm that disclosure occurs only on a need to know basis, and care must be taken to limit the number of individuals receiving information about the student's disability.

D. IMPLEMENTATION

The Policy must establish who has institutional authority for decision-making, as well as the process for approving and developing accommodation solutions. The Policy should be communicated to all parties in a format that is accessible to them. It must consider opportunities

to revisit evolving accommodation requests, since students may not know that they have accommodation requirements until later in the term. The determination that no reasonable alternative exists to accommodate the student's specific disability-related needs must be made on a case-by-case basis.

The Policy should also contemplate the process for resolving problems arising from the accommodation process, including expectations about how consultation and negotiation around accommodations will occur. The Policy should clearly set out a dispute mechanism or appeal process in the event that accommodations are refused, or a placement is denied to a student with a disability. While it would be valuable to a clinical program to conduct an interview with each student upon completing the program, this would be especially so for students with disabilities.

E. DETERMINATION OF ESSENTIAL REQUIREMENTS

The determination of a degree program's essential requirements requires careful thought. It is a pedagogical exercise and is the responsibility of the program's academic counterparts. The crafting of a program's learning objectives depends on the essential requirements of the placement, which requires input from the placement site. While the placement site cannot determine the learning objectives nor the essential requirements of the academic program, their collaboration in the process of curriculum development is integral to the successful achievement of the program. Exploring how essential requirements and learning objectives may be carried out or fulfilled in a variety of ways is likely to be important for clinical partners. Where placements are not amenable to accommodations for students with disabilities, a different placement site will likely be required. The policy should make it clear that the principal goal of the clinical education placement is to provide a pedagogical opportunity for the student involved.

IV. IS ACCOMMODATION ENOUGH?

Clearly an understanding of human rights law is relevant to the removal of barriers faced by law students with disabilities in clinical education, and specific law school policies and procedures designed to address accommodation in clinical settings are needed. There are, however, limits to this approach in achieving accessibility. Inclusion and accessibility require more than meeting the minimal requirements of Ontario's *Human Rights Code*. Foremost, human rights models rely on the provision of accommodations to access an otherwise inaccessible environment as the means of achieving inclusion. This approach relies on both individual self-disclosure and disability labelling and documentation in order to access accommodations, which risk the perpetuation of stigma and bias. Moreover, as students emphasize, the increased time and effort on their part to consult about accommodations and secure approved documentation adds to their workload while reinforcing the notion that inclusion is an individual responsibility to be negotiated.

Under the accommodation model, constructed barriers are permitted to remain in place.¹²⁰ Adjustments (accommodations) are made, within this model, to enable students with disabilities to "fit in." Accommodation suggests that we try to make "different" people fit into existing

¹²⁰ Shelagh Day & Gwen Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75 Can Bar Rev 433.

systems,¹²¹ rather than abandoning the idea of “normal” and working for genuine inclusiveness.¹²² In addition, mainstream accommodation models do not effectively challenge imbalances of power and cannot address the underlying social structures at the root of equality claims as long as the formal standard remains intact.¹²³

The principle of accommodation must be reimagined to include “transforming norms that are based on majoritarian values into norms that are more inclusive of all abilities and characteristics.”¹²⁴ To build a more accessible post-secondary education system, accommodation must shift from a concept that promotes minor tinkering to a concept that aims to redefine the status quo.¹²⁵ That bigger-picture shift would embrace disability consciousness-raising and incorporate the principles of universal design in education. This approach would attend to both decentering normative accounts of personhood and embodiedness which construct disability (indeed any morphology) as deviant while simultaneously emphasizing the systemic benefits for accessibility of universal design principles.¹²⁶ Universal Design for Learning (UDL) principles, derived from the architectural roots of Universal Design, account for the diversity of learners and the diversity of learning environments in post-secondary education. More specifically, UDL requires that there be multiple means of student engagement, content delivery, and student self-expression.¹²⁷ Clinical legal education programs can—and must—create universally accessible learning environments. One-off or ad-hoc accommodations are problematic, in part because the recipients of accommodation measures are constructed as different and requiring of “special treatment.” Moreover, accommodations are never permanent, and are after-the-fact measures taken most often to make the person requesting the accommodation “perform and behave in a particular way.”¹²⁸ Universal Design, on the other hand, anticipates planning and designing for diversity at the outset. It is an orientation that recognizes and welcomes diverse embodiment as the norm, and designs for the broadest range of users and participants, while remaining flexible and responsive.¹²⁹ Flexible work hours and spaces are simple examples of universal design. A focus on Universal Design does not mean that individual accommodations will never be necessary, nor is the approach a guaranteed recipe for success. But in eschewing a normative learner by following UDL principles, disability is recognized as always present, welcomed, and planned for.

V. CONCLUSION

¹²¹ *Ibid* at 462. See also Rod Michalko, *The Difference That Disability Makes* (Philadelphia: Temple University Press, 2002) at 128–31.

¹²² Day & Brodsky, *supra* note 120. See also Dolmage, *supra* note 35 at 70.

¹²³ Day & Brodsky, *supra* note 120 at 462: “It allows those who consider themselves ‘normal’ to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are accommodated.”

¹²⁴ Yvonne Peters, “Twenty Years of Litigating for Disability Equality Rights: Has it Made a Difference? An Assessment by the Council of Canadians with Disabilities,” *Council of Canadians with Disabilities* (2004), online: <ccdonline.ca/en/humanrights/promoting/20years> [perma.cc/RH38-LNPA].

¹²⁵ NEADS Accessibility and Accommodation, *supra* note 17 at 47.

¹²⁶ For a list and discussion of Universal Design principles see: Dolmage, *supra* note 35 at 116.

¹²⁷ *Ibid* at 124.

¹²⁸ *Ibid* at 122.

¹²⁹ Margaret Price, *Mad at School: Rhetorics of Mental Disability in Academic Life* (Ann Arbor: University of Michigan Press, 2011) at 129–30.

Clinical education has become an increasingly relevant pedagogy in post-secondary and professional education¹³⁰ including law school, where the menu of offerings has blossomed. This article was motivated by practical questions about the scope of the duty to accommodate law students with disabilities in clinical education placements. Who is responsible for accommodation in clinical programs? Who pays for accommodations? Who has access to disclosure information? Answering these specific questions reveals deeper questions about inclusion in legal education.

Law students with disabilities face barriers in education including finding summer jobs and articling positions. These barriers persist into legal practice. Participation in clinical programs during law school is a good place to start breaking down these barriers.¹³¹ These experiences can be tremendously valuable for law students with disabilities and might be their first chance to obtain a reference letter or to experiment with accommodations in a workplace. Such placements take on “additional significance because of social inequalities in education and income that result in drastically poor employment outcomes for people with disabilities.”¹³²

Inspired by the Ontario Human Rights Commission’s very recent work on the accessibility of education in Ontario, this article offered a legal analysis of the human rights accommodation framework in relation to clinical legal education placements. As we noted, however, there are limits to this individualized model of accessibility which Universal Design for Learning Principles might remedy.

Additional work is necessary to collect empirical evidence about the barriers Canadian law students with disabilities confront in applying to and working in clinical placements. This data, including qualitative data, should be collected to track and remedy disability-related barriers in clinical and experience-based learning opportunities. There is no doubt that disability is part of the range of human experience and human variation. This perspective must inform the learning environments of all aspects of the law school to ensure that it is accommodating, accessible, and inclusive.

¹³⁰ Canadian Council on Learning, “Lessons in Learning: The Benefits of Experiential Learning” (2008) COPIAN, online: <en.copian.ca/library/research/ccl/benefits_learning/benefits_learning.pdf> [perma.cc/LYP9-MUF3].

¹³¹ Simmons & MacGregor, *supra* note 23. See also Lori Brie & Elizabeth Evans Getzel, “Internships in Higher Education: Promoting Success for Students with Disabilities” (2001) 21:1 Disability Studies Q online: <dsq-sds.org/article/view/254/257> [perma.cc/G9JP-GNZZ].

¹³² Margo Izzo & M Peg Lamb, “Self-Determination and Career Development: Skills for Successful Transitions to Postsecondary Education and Employment - White Paper” NCSET (2002), online: <ncset.hawaii.edu/publications/pdf/self_determination.pdf> [https://perma.cc/QA88-UQT6].